minate permit * * * and such public utility shall hold such permit under all the terms, conditions and limitations of said act...

Sec. 12774, ibid.

...such item or items (of expenses)...as the Commission may deem unnecessary or excessive, shall not be taken into consideration in determining and fixing the rates which such utility is permitted to charge for the service which it renders.

Vol. 4, Sec. 12722, Burns' Ann. Ind. Stat. 1929, Supp.

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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1932.

No. 128

WABASH VALLEY ELECTRIC COMPANY,
Appellant,

vs.

RALPH M. YOUNG,
(SUBSTITUTED FOR FRANK T. SINGLETON) ET ALS.,
Appellees.

PETITION OF THE APPELLANT FOR A REHEARING.

GEORGE A. COOKE,
FRANCIS L. DAILY,
JOHN C. LAWYER,
HOWARD S. YOUNG,
Counsel for Appellant.

R. S. ANDERSON,
Of Counsel.

THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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PETITION OF THE APPELLANT FOR A REHEARING.

Comes now the above named appellant, Wabash Valley Electric Company, and presents this, its petition for a rehearing of the above entitled cause, and, in support thereof, respectfully shows:

I.

THE COURT HAS OVERLOOKED THE CONTROLLING EFFECT OF THE CASES CITED ON PAGES 48-56 OF OUR BRIEF AND ON PAGE 7 OF OUR REPLY BRIEF WITH RESPECT TO THE AMOUNT OF PROPERTY CONSTITUTING THE RATE BASE.

The court appears to have measured the scope of the constitutional question in this case not by reference to the issue made by appellant's bill, that its property as a

whole was being taken, but by what it conceived to have been the scope of the legislative proceeding before the commission. Actually the record clearly shows that even before the commission appellant insisted upon protection for its property as a whole (R. 20-24), and the commission in its order recognized this fact (R. 29-32). In any event, whatever freedom the commission may have had to fix rate differentials as between various geographical areas in appellant's territory, it had no constitutional power to force any part of appellant's rates still lower when the earnings of the property as a whole were already non-compensatory. It was this issue which was made by the bill. Every previous decision of this court bearing upon the question supports appellant's contention that a utility property as a whole, where the property is a physically integrated and interconnected one, is the rate base for the company which owns such property; and that as the company cannot on the one hand complain because its rates as applied to a portion of such property are unprofitable provided its property as a whole shows a fair return, so on the other hand it can justly complain if at a time when its rates as applied to its property as a whole are already unprofitable, certain of such rates are further reduced without its consent on the sole theory that such reduced rates will be profitable as applied to a certain portion of the property. The numerous cases cited in appellant's original brief and reply brief fully justify this deduction as to the state of the law. The earlier decisions of the court appear to be of controlling effect. It can only be concluded that the application of the decisions has been overlooked. We ask the court again to consider the numerous authorities cited in our previous briefs on this subject.

II.

THE LANGUAGE OF THE OPINION IS INCONSISTENT WITH RESPECT TO THE AMOUNT OF PROPERTY WHICH MAY BE REGARDED AS USED AND USEFUL IN A RATE CASE.

The court in its opinion says:

> "Normally, the unit for rate making purposes, we may assume, would be the entire interconnected operating property of a utility used and useful for the convenience of the public in the territory served, without regard to particular groups of consumers or local subdivisions."

This statement, with which we thoroughly agree, by necessary inference includes the proposition that where an interconnected operating property covers a number of local subdivisions, *i. e.*, cities and towns, each part of the interconnected property is used and useful for the convenience of the public in the entire group of cities or towns. Yet the opinion contains three subsequent statements which seem to us inconsistent with this principle. It says:

> "In addition to what already has been said, it should be noted that appellant not only furnishes electric current to the fifty separate and unrelated towns and cities, *in none of which the plant is used or useful for the rendition of service to any other town or city,*" *etc.* * * *
>
> "To meet this objection it is only necessary that there shall be brought into the rate base the value of all property of appellant which is in fact used and useful for supplying the electric current to the city. *Manifestly, the local plants in other towns and cities bear no such relation to the Martinsville plant.*" * * *
>
> "There is also evidence that the appraisal cov-

ered the local property in the other municipalties, *which, as we have seen, are without relation to the Martinsville distribution.*" * * *

This language is likely to be construed as announcing as a matter of law that a utility property located within one city is never used or useful for the rendition of service in another, even though it is part of an interconnected system extending over several cities; and it is likely to be argued, upon the authority of these statements, that such an interconnected property can for that reason never be taken as a rate base for the fixing of rates in the territory as a whole. It is, of course, a physical fact that the wire which leads into a house located in one city is not employed to carry electricity into a house in another city. But it is equally true that the wire which leads into the house of one consumer is not utilized in carrying energy into his neighbor's house next door, in the same city. No one would deny that both wires in the instance last cited are used and useful parts of the single system which serves the city. It follows equally that where the interconnected system of a company serves a number of cities the wires in one city are as much used and useful in serving another city in the system as the wires in one city block are used and useful with respect to the inhabitants of another block in the same city. The political subdivisions defined as cities are of no more significance in the problem than the political wards of a single city, where the same interconnected property is lawfully serving both.

Not only are the three statements last above quoted inconsistent with the general rule previously announced in the opinion, but no one of them is necessary to the decision. The opinion would be clarified and the possibility of mischievous consequences avoided if the language in question were eliminated. If this is not done

the language should at least, we submit, be so modified as to eliminate the possibility of an interpretation that that part of an interconnected utility property located in one municipality cannot, as a matter of law, be considered as used and useful in serving another municipality which is on the same system.

III.

IN INTERPRETING THE INDIANA UTILITIES ACT BY REFERENCE TO THE DECISION IN EAU CLAIRE v. WISCONSIN LIGHT AND POWER COMPANY, 178 WIS. 207, THE COURT HAS MISAPPREHENDED THE STATE OF THE LAW IN WISCONSIN ON THIS SUBJECT.

The court has treated the language of the supreme court of Wisconsin in the *Eau Claire* case as if it were applicable to a confiscation case. The language must, however, be read in the light of the question which was before the court. (*Weaver* v. *Palmer Bros. Co.*, 270 U. S. 402, 414; *Sinclair* v. *U. S.*, 279 U. S. 749, 767.)

What that question was clearly appears from the court's statement in the *Eau Claire* case:

> "But in this connection there is no contention that the rates fixed yield an unreasonable return to the utility. The complaint is that the return to, or income of, the utility resulting from the rate fixed by the order under review is unlawfully and unreasonably distributed among the municipalities constituting the so-called 'Loop System'."

The question thus was one of discrimination as among the municipalities, and it was with reference to this that the Wisconsin court used the language quoted by this court in its opinion. The facts as disclosed by the opinion in the *Eau Claire* case indicate that the case was a hard one as applied to the appealing municipali-

ties, with the usual result that bad law was made—law so bad as to evoke a vigorous dissent from two members of the court, followed by a subsequent repudiation of the majority opinion by the legislature. But the court in the *Eau Claire* case gave no intimation that it was deciding that the commission, by whatever device, could use its privilege of setting up rate differentials between municipalities in such manner as to accomplish confiscation of the property as a whole. On the contrary, it recognized in the *Eau Claire* case that its earlier decision in *Milwaukee Electric Light and Railway Co.* v. *Railroad Commission,* 171 Wis. 297, was still applicable where the question of confiscation was involved. That case turned directly upon the question whether a rate fixed by the commission for a street railway system serving Milwaukee and its suburbs, which was adequate as applied to the system as a whole, but inadequate as applied to the suburbs, could be sustained. It was held that:

> "* * * the true test is not the effect of the order upon a single line or upon a part of the system, but upon the whole system."

This case has recently been cited and its doctrine reaffirmed in *City of Milwaukee* v. *Railroad Commission,* 206 Wis. 339, involving a similar issue. The result of the Wisconsin authorities is that when discrimination between municipalities is the issue it is proper to consider the cost of the service as related to the several municipalities involved in an interconnected system, but that when confiscation is the issue, the entire operating system is the proper rate base.

The court has quite overlooked, moreover, the fact that the local historical matter relied upon by the Wisconsin court in the *Eau Claire* case as a basis for its opinion (as referred to by this court in the present opin-

ion) has no relevance as applied to the Indiana statute. The Wisconsin law was passed in 1907 (Wisconsin Laws, 1907, Ch. 499). The Indiana law was passed in 1913. (Indiana Acts, 1913, p. 167.) The historical data given in the appendix to appellant's reply brief (pp. 54-55) plainly show that whatever may have been the state of development of public utility systems in Wisconsin in 1907, interconnected systems serving several communities had become common in Indiana by 1913 when the utility act of that state was passed, and that matters local to Wisconsin in 1907 could not have been in the minds of the Indiana legislators.

If appellant's constitutional right to protection of its property from confiscation is to be influenced by the meaning of the Indiana statute, that meaning should be ascertained by reference to the language of the statute itself, and not upon the authority of the *Eau Claire* case. We respectfully suggest that the court has overlooked the entire absence of anything in the Indiana statute justifying the conclusion that the city was intended to be the rate making unit, and we refer the court to the argument in our briefs upon the subject.

IV.

APPELLANT'S CONSTITUTIONAL RIGHTS CAN NOT BE AFFECTED BY THE TERMS OF THE STATE STATUTE.

The court notes the fact that if appellant's system were all located in Martinsville, the rate based would of course be the property in Martinsville alone. It points out that that condition, which once obtained, has been modified to the extent that Martinsville has now become merged into a larger property in which energy for many communities, including Martinsville, is drawn at wholesale from a common source. It then defines the question

as whether in view of the latter fact the city may still be treated as a separate unit for rate-making purposes, and states that the answer primarily depends upon the meaning of the Indiana statute. We are impressed with the thought that the court has been led to this conclusion by the fact that in our original brief we pointed out provisions of the Indiana statute from which it could be concluded that the property of a utility is intended to be dealt with as a whole and not piecemeal. Those observations, however, were offered merely by way of answer to the construction of the statute contended for by appellees, and by no means as a concession that the constitutional question could be determined by reference to the meaning of the statute.

It must be clear that it is wholly immaterial in the solution of the constitutional question in this court whether or not the commission proceeded lawfully under the state statute. The only question is whether or not its action resulted in confiscation of the property. This court would of course not set aside an order of the commission, however erroneous under the state law, if no confiscation was practiced. Conversely, though the commission may have proceeded ever so rightly under the forms of the state law, its action could not be upheld if it constituted a violation of the constitution. It is not clear from the opinion whether the court considered that the adoption of the city as the rate making unit was justified under the constitution because it represented a correct procedure under the state statute. If this be the real meaning of the opinion, we must protest that the court has permitted appellant's constitutional rights to be limited by referring to local forms of procedure. If, on the other hand, the court was led into its discussion of the proper meaning of the state statute by our reply to appellee's extensive argument upon that point, then we respectfully suggest that a mutual error

has occurred which can be properly corrected only by the omission of all reference to the meaning of the state statute.

A study of the opinion indicates that after satisfying itself that the terms of the state statute were not transgressed, the court proceeded to examine the constitutional question, and that it decided that question upon a consideration of the difficulty created by the intermingling of appellant's business with that of the affiliated utilities. If, as appears, this was the ground of the decision, we respectfully urge that the opinion be clearly rested upon that ground alone.

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted, and that the decree of the district court be, upon further consideration, reversed.

Respectfully submitted,

GEORGE A. COOKE,
FRANCIS L. DAILY,
JOHN C. LAWYER,
HOWARD S. YOUNG,
Counsel for Appellant.

R. S. ANDERSON,
Of Counsel.

CERTIFICATE OF COUNSEL.

We, Francis L. Daily and John C. Lawyer, counsel for the above named appellant, Wabash Valley Electric Company, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

FRANCIS L. DAILY,
JOHN C. LAWYER,
Counsel for Appellant.